

*Chapman*

JUL 16 2001

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RODERICK C. MANN,	)	
	)	
Plaintiff,	)	No. C00-5641FDB
	)	
vs.	)	RESPONSE TO DEFENDANT'S
	)	MOTION TO DISMISS
AMERICAN AIRLINES,	)	
	)	
Defendant	)	

**FACTS**

Defendant ignores a crucial fact in making its Motion to dismiss. Prior to serving process, Plaintiff had already received additional time in which to serve the Complaint. The procedural aspects of this case are summarized as follows.

On July 31, 2000 a Notice of Right to Sue was issued to Plaintiff herein. A copy of said Notice of Right to Sue is attached hereto as Exhibit A and is incorporated herein fully by this reference.

On October 30, 2000 Plaintiff commenced the action herein by filing a Complaint pro se and being issued a Summons by the Clerk of the Court. Plaintiff did not serve

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**Attorney at Law**

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1 the Complaint within the 120 day period required by FRCP  
2 4(m). Consequently, on March 27, 2001 the Court issued to  
3 Plaintiff an Order to Show Cause Why Case Should Not be  
4 Dismissed.

5 Based upon that Notice, Plaintiff made prompt  
6 arrangements to consult with counsel in the Tacoma area  
7 and, in fact, retained counsel herein, Douglas R. Cloud.

8 On or about April 19, 2001, Plaintiff, through his  
9 counsel, filed a Response to Order to Show Cause Why Case  
10 Should Not be Dismissed and Motion for Extension of Time  
11 for Service of Summons and Complaint and Proposed Order  
12 By Minute Order dated May 8, 2001 the Court granted  
13 Plaintiff 30 additional days to serve Defendant, stating  
14 that service should be completed not later than June 8,  
15 2001. A copy of the Court's Order to that effect is  
16 attached as Exhibit B and is incorporated herein fully by  
17 this reference.

18 On or about May 30, 2001 Plaintiff herein, by and  
19 through his attorney of record, filed an Amended Complaint  
20 and the Court issued the Summons. Service was accomplished  
21 on June 4, 2001. A copy of the Declaration of Service is  
22 attached as Exhibit C and is incorporated herein fully by  
23 this reference

24 It appears that Defendant's claim of "prejudice" as a  
25 result of the purported late service of the Summons and  
26 Complaint has been withdrawn. (See, Defendant's Addendum)

1 Defendant's counsel now states that the EEOC investigative  
2 file has not been destroyed and is available to both  
3 parties Thus, Defendant's claim of prejudice in their  
4 opening Brief as a result of the purported destruction of  
5 the EEOC investigative file has been withdrawn.

6 **RELIEF REQUESTED**

7 Denial of Defendant's Motion to Dismiss.

8 **ISSUE**

9 Has service been timely effectuated?

10 **LEGAL ARGUMENT**

11 It is Plaintiff's contention that he has fully  
12 complied with FRCP 4(m) because, pursuant to the rule, he  
13 requested additional time to serve the Summons and  
14 Complaint and his Motion was granted. He complied with the  
15 Court's Order in response to his Motion for Extension of  
16 Time and, thus, the case herein has been validly commenced

17 FRCP 4(m) reads as follows:

18 Time Limit for Service. If service of the  
19 summons and complaint is not made upon the  
20 defendant within 120 days after filing the  
21 complaint the court, upon motion or on its own  
22 initiative after notice to the plaintiff, shall  
23 dismiss the action without prejudice as to that  
24 defendant or direct that service be effectuated  
within the specified time, provided that if the  
plaintiff shows good cause for the failure, the  
court shall extend the time for service for an  
appropriate period. This subdivision does not  
apply to service in a foreign country pursuant to  
subdivision (f) or (j) (1).

25 The United States Supreme Court has indicated that the  
26 1993 amendment to the rules which resulted in the adoption  
27

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1 by the Federal Courts of FRCP 4(m) resulted in the District  
 2 Court's having discretion to enlarge the 120 period, even  
 3 if there is no good cause shown Henderson v. U.S., 116  
 4 S.Ct. 1638, 1643, 517 U.S. 654, 661, 134 L Ed.2d 880 (1996)  
 5 (Ginsberg, J. citing advisory committee's notes on Federal  
 6 Rule of Civil Procedure 4, 28 U.S.C. App., p. 654).

7 The Ninth Circuit has apparently formed the same  
 8 conclusion as the Supreme Court, i.e., that FRCP 4(m)  
 9 allows the Court to grant the plaintiff additional time to  
 10 serve the complaint even if good cause has not been shown.  
 11 See, De Tie v. Orange County, 152 F.3d 1109 at 1111,  
 12 footnote 5 (9th Cir. 1998).<sup>1</sup>

13 A possible reason for granting additional time to the  
 14 Plaintiff is the reason cited by the Ninth Circuit in the  
 15 above-referenced footnote of the possibility that if the  
 16 motion to dismiss is granted, the statute of limitations  
 17 would bar the refiled action. That is the case in the  
 18

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19  
 20 <sup>1</sup> The footnote cited states as follows

21 If no good cause is shown, the 1993 amendments to  
 22 Rule 4(m) permit, but do not require, the  
 23 district court to extend the time for service.  
 24 See Fed.R.Civ.P. 4, advisory committee note to  
 25 1993 amendments, subdivision m. Such  
 26 discretionary relief may be justified "if the  
 27 applicable statute of limitations would bar the  
 refiled action." Id. Our conclusion that De Tie  
 established good cause entitling him to mandatory  
 relief makes it unnecessary to address the  
 contention that the district court failed to  
 consider discretionary relief.

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1 present matter.

2 Thus, whether or not the Court had good cause to grant  
3 additional time in which to serve the Complaint, the fact  
4 of the matter is, the Court doesn't need good cause to  
5 grant the Motion. In this case, the District Court has  
6 already exercised its discretion and because the discretion  
7 was properly exercised, i.e., either by the showing of good  
8 cause or by the exercise of the Court's discretion in the  
9 absence of good cause, the District Court made the correct  
10 ruling.

11 Therefore, Defendant's Motion to Dismiss should be  
12 denied. To do otherwise would result in a permanent bar to  
13 Plaintiff's cause of action which, according to the  
14 advisory notes of the committee that recommended the  
15 adoption of FRCP 4(m), would be inappropriate.

16 The Court's discretion in deciding whether or not to  
17 grant additional time in which to serve the Complaint  
18 remains even if "good cause" is not shown. See, Slabov v.  
19 Merriot International, Inc., 990 F Supp. 566 (D.C. Ill.  
20 1998) and Goodstein v. Bombadier Capital, Inc., 167 FRD 662  
21 (D. Vt. 1996).

22 Had Plaintiff not made his request pursuant to FRCP  
23 4(m), perhaps Defendant's argument would have more merit.  
24 In fact, that is the factual distinction between the  
25 present case and those cases cited by Defendant upon which  
26 they seem to be primarily relying, i.e., Ocasio v. Fashion  
27

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1 Institute of Technology, 86 F Supp. 3d 371, 376 (S D. NY  
2 2000) and Amnay v Dell Labs, 117 F Supp. 3d 283, 287 (E.D  
3 NY 2000).

4 In both Ocasio and Amnay, supra, it appears that the  
5 plaintiff did not make the requisite Motion for Extension  
6 of Time pursuant to FRCP 4(m) that Plaintiff did in this  
7 case. Therefore, there is an important factual distinction  
8 in those holdings that Defendant has not noted. Thus,  
9 Defendant is essentially asking the Court to reconsider and  
10 reverse the earlier Order allowing additional time in which  
11 to serve the Complaint pursuant to FRCP 4(m). In that the  
12 Court has already properly exercised its discretion on that  
13 issue, it is inappropriate for the decision to be  
14 reconsidered.

15 In regard to the Amended Complaint, it is Plaintiff's  
16 contention that the Amended Complaint was properly filed  
17 and served pursuant to FRCP 15, which reads in pertinent  
18 part as follows:

19 (a) Amendments. A party may amend the party's  
20 pleading once as a matter of course at any time  
21 before a responsive pleading is served or, if the  
22 pleading is one to which no responsive pleading  
23 is permitted and the action has not been placed  
24 upon the trial calendar, the parties may so amend  
25 it at any time within 20 days after it is served

26 The Amended Complaint was filed before the responsive  
27 pleading (the Answer) was due as Defendant had not been  
served yet. In any event, the original Complaint and the  
Amended Complaint were both served on Defendant at the same

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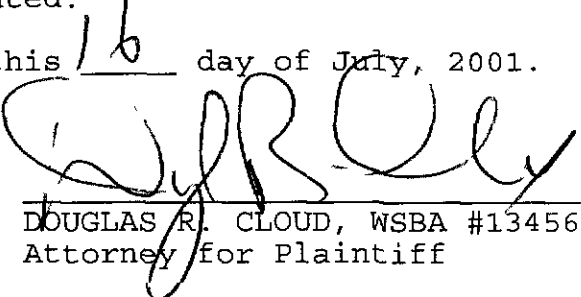
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1 time.

2 PRAYER FOR RELIEF

3 It is Plaintiff's contention that he has fully  
4 complied with the Court rules regarding service and service  
5 of the Amended Complaint and therefore, Defendant's Motion  
6 to Dismiss should not be granted.

7 Respectfully submitted this 16 day of July, 2001.

8   
9  
10 DOUGLAS R. CLOUD, WSBA #13456  
Attorney for Plaintiff

11 DECLARATION OF SERVICE

12 On this day the undersigned sent  
13 to the attorneys of record herein a  
14 copy of this document by U.S. mail,  
postage prepaid, and/or by attorney's  
messenger service and/or by facsimile.

15 I certify under penalty of perjury  
16 under the laws of the State of  
Washington that the foregoing is true  
17 and correct.

18 DATED: July 16, 2001  
19 PLACE: Tacoma, WA  
NAME: Laura J. Dora

20 mann obj  
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DOUGLAS R. CLOUD

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## NOTICE OF RIGHT TO SUE

To Roderick C Mann  
717 North C Street  
Tacoma, WA 98403

From EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION  
Dallas District Office  
207 S Houston  
Dallas, Texas 75202

☐ On behalf of a person aggrieved whose identity is  
*CONFIDENTIAL (29 CFR s 1601.7(a))*

Charge No.	EEOC Representative	Telephone No.
310-93-1023	Suzanne M Anderson	(214) 655-3337
(See the additional information attached to this form)		

### YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON

- ☐ The facts you allege fail to state a claim under any of the statutes enforced by the Commission
- ☐ Respondent employees less than the required number of employees
- ☐ Your charge was not timely filed with the Commission, i.e., you waited too long after the date(s) of the discrimination you alleged to file your charge. Because it was filed outside the time limit prescribed by law, the Commission cannot investigate your allegations.
- ☐ You failed to provide requested information, failed or refused to appear or to be available for necessary interviews/conferences, or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than 30 days in which to respond to our final written request.
- ☐ The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.
- ☐ The Respondent has made a reasonable settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.
- ☐ The Commission has concluded that, based on the evidence presented, there is insufficient basis on which to proceed with the investigation. The charge is therefore dismissed.
- ☒ Other (briefly state): The Commission has declined to take further action in this matter.

### - NOTICE OF SUIT RIGHTS -

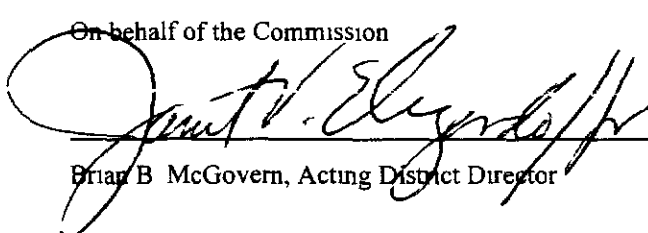
- ☒ **Title VII and/or the Americans with Disabilities Act:** This is your NOTICE OF RIGHT TO SUE. You have the right to sue the Respondent(s) named in your charge in U.S. District Court. If you decide to sue, you must sue **WITHIN 90 DAYS** from your receipt of this Notice; otherwise your right to sue is lost.
- ☐ **Age Discrimination in Employment Act:** This is your NOTICE OF DISMISSAL OR TERMINATION, which terminates processing of your charge. If you want to pursue your charge further, you have the right to sue the Respondent(s) named in your charge in U.S. District Court. If you decide to sue, you must sue **WITHIN 90 DAYS** from your receipt of this Notice; otherwise your right to sue is lost.
- ☐ **Equal Pay Act (EPA):** EPA suits must be brought within 2 years (3 years for willful violations) of the EPA underpayment.

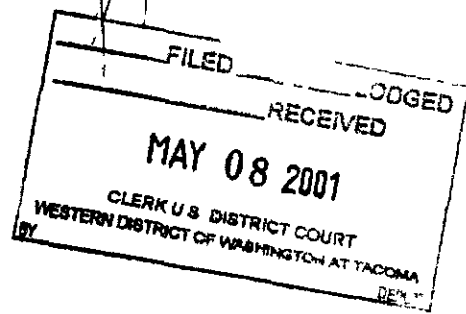
I certify that this notice was mailed on the date set out below,

**JUL 31 2000**

Date Mailed

On behalf of the Commission

  
Brian B. McGovern, Acting District Director



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RODERICK C. MANN,

Plaintiff,

vs

AMERICAN AIRLINES,

Defendant

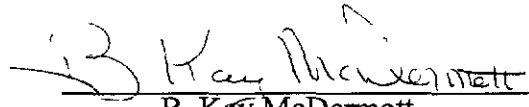
C00-5641FDB

MINUTE ORDER

NOW, on this 84th day of May 2001, the Court directs the Clerk to enter the following Minute Order.

Plaintiff's Motion For Extension of Time is granted. Plaintiff shall complete service no later than June 8, 2001. The parties shall confer and provide the Court with a Joint Status Report (following the format in the Order of November 1, 2000) no later than July 9, 2001.

The foregoing Minute Order entered at the direction of the Honorable **FRANKLIN D. BURGESS**, United States District Judge.

  
B. Kay McDermott  
Courtroom Deputy

IN THE

## UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASH. AT SEATTLE

CAUSE NO C00-5641FDB

RODERICK C MANN

Declaration Of Service Of

vs  
AMERICAN AIRLINES

Plaintiff/Petitioner

SUMMONS IN A CIVIL CASE, AMENDED COMPLAINT,  
EMPLOYMENT DISCRIMINATION COMPLAINT

## DECLARATION

Defendant/Respondent

Hearing Date

The undersigned hereby declares That s(he) is now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, and is competent to be a witness therein

On the date and at the time of **Jun 4 2001 11 50AM** at the address of **520 PIKE ST SUITE 2610**

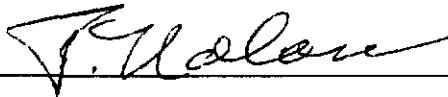
**SEATTLE** within the county of **King** state of **WA**, the declarant duly served the above described documents upon  
**AMERICAN AIRLINES**

by then and there personally deliverng 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with  
**T SMITH SECRETARY IN THE OFFICE OF CT CORP , REGISTERED AGENT**

The documents listed above were served in accordance with RCW 4 28 080 and/or client instructions. If service was substituted on another person or left with a person that refused to identify themselves, it is incumbent upon the client to notify ABC immediately in writing, if further attempts to serve, serve by mail, or investigate are required. If service was substituted on another person, pursuant to RCW 4 28 080 (16), service shall be complete on the tenth day after a copy of the documents are mailed to the subject at the address where service was made. Documents were not mailed by ABC

No information was provided or discovered that indicates that the subjects served are members of the U S military

I HEREBY DECLARE UNDER PENALTY OF PERJURY  
UNDER THE LAWS OF THE STATE OF WASHINGTON  
THAT THE FOREGOING IS TRUE AND CORRECT



DATED Jun 6 2001 IN  
Seattle, WA by

P Nolan  
KCR#9300978

Service	10 00	Investigations		Special	0 00
Travel	7 00	Secretarial	0 00	Wait/Stake Out Time	0 00
Bad Address	0 00	Postage	0 00	Other	0 00
Proof Preparation	7 00	Photo	0 00	Total	24 00
Summons Copy	0 00	Notary	0 00	Pre-Paid Retainer	0 00
				Amount Due	

Process Regular

Service Notes

License Plates

ORIGINAL SENT  
JUN 07 2001  
FOR FILING

Client Ref # CLOUD/TERRI

EXHIBIT C

Cloud, Douglas R  
901 S. 'I' St, #101  
Tacoma, WA 98405

(253) 627-1505

CLIENT COPY  
- PROOF OF SERV

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RODERICK C. MANN, )  
 )  
Plaintiff, ) No C00-5641FDB  
 )  
vs. )  
 ) DECLARATION OF SERVICE  
AMERICAN AIRLINES, )  
 )  
Defendant. )

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington as follows.

I am over the age of eighteen years and not a party to this action.

On July 16, 2001 I served a copy of the Response to Defendant's Motion to Dismiss in the above referenced matter on Defendant AMERICAN AIRLINES by facsimile transmission on that date to JAMES G ZISSLER at the facsimile number of 206-447-4965 and by delivering a copy of the document listed above into the hands of a messenger service with the instructions to deliver said document to JAMES G. ZISSLER at 999 Third Avenue, Suite 3900, Seattle,

**DOUGLAS R. CLOUD**

**Attorney at Law**


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1 WA 98104. The facsimile transmission was reported as  
2 complete and without error. A copy of the transmission  
3 report, properly issued by the transmitting machine, is  
4 attached

5 Signed at Tacoma, Washington this 16th day of July,  
6 2001

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9 TERESA J. PENCE

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TRANSMISSION VERIFICATION REPORT

TIME . 07/16/2001 15:46

DATE, TIME	07/16 15:40
FAX NO./NAME	12064476965
DURATION	00:06:00
PAGE(S)	13
RESULT	OK
MODE	STANDARD
	ECM